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No. [redacted] 54

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

EPHRAM NESTOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The memorandum opinion of the District Court, holding Section 202(n) of the Social Security Act unconstitutional, is reported at 169 F. Supp. 922, and is set forth in Appendix A, *infra*, pp. 21-48.

JURISDICTION

This suit was instituted under Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g), to review a decision by the Social Security Adminis-

tration, Department of Health, Education, and Welfare, suspending the payment of monthly social security benefits under Title II of the Social Security Act (42 U.S.C. 401-425) to a deported alien, as required by law. The order of the District Court was entered on January 21, 1959, and amended on February 20, 1959 (Appendix A, *infra*, pp. 49-52). A notice of appeal to this Court was filed in the District Court on February 20, 1959. The jurisdiction of this Court to review by direct appeal the decision entered in this cause is conferred by 28 U.S.C. 1252; *Reid* v. *Covert*, 351 U.S. 487, 489; *Fleming* v. *Rhodes*, 331 U.S. 100, 102-104.

QUESTION PRESENTED

Whether an alien who has been awarded and has commenced to receive monthly social security benefits under Title II of the Social Security Act (42 U.S.C. 401-425) has a vested or "property" right to the continued receipt of such benefits, of such a nature that the suspension of such payments pursuant to express statutory direction, following his deportation from this country, deprives him of property without due process of law, where the statute commanding the suspension—Section 202(n) of the Social Security Act, as amended, 42 U.S.C., Supp. V, 402(n), providing that no monthly social security benefit shall be paid to any person who has been deported under any of various designated paragraphs of Section 241(a) of the Immigration and Nationality Act, 8 U.S.C. 1251(a), until his lawful readmittance to the United States for permanent residence—was enacted prior to the date on which the alien first became eligible for any social security benefits.

STATUTES INVOLVED

The pertinent provisions of Section 202(n) of Title II of the Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 622), as amended by the Act of September 1, 1954, c. 1206, § 107, 68 Stat. 1083 (42 U.S.C., Supp. V, 402(n)), and of Section 241(a) of the Immigration and Nationality Act (Act of June 27, 1952, c. 477, 66 Stat. 163, 204) (8 U.S.C. 1251(a)) are set forth in Appendix B, *infra*, pp. 53-63.

STATEMENT

Appellee is an alien who immigrated to the United States from Bulgaria, and who was deported to his native country on July 7, 1956, pursuant to paragraph (6)(C)(i) of Section 241(a) of the Immigration and Nationality Act (Appendix B, *infra*, pp. 54, 56), as an alien who had been after entry a member of the Communist Party of the United States (R. 1-2, 48-49).[1]

Appellee became entitled to social security benefits on November 13, 1955, by virtue of having attained the age of 65 (R. 12, 51). He filed an application for such benefits on December 2, 1955 (R. 37-41), and on March 7, 1956, received an award of $55.60 per month effective as of November 1955 (R. 51).

On August 31, 1956, subsequent to appellee's deportation, the Bureau of Old-Age and Survivors

[1] The opinion below (Appendix A, *infra*, p. 21) states that appellee's deportation was effected pursuant to "paragraph (1)" of Section 241(a) of the Immigration and Nationality Act. The correct statutory designation is, however, as indicated in the text, paragraph (6)(C)(i) of Section 241(a). The reference in the opinion below apparently originated from a mistaken reference in the Social Security administrative record (repeated in appellant's memorandum in opposition to appellee's motion for summary judgment), to "paragraph (1) of Section 241(a)" as the statutory basis of appellee's deportation (R. 49).

Insurance of the Social Security Administration, Department of Health, Education, and Welfare ("the Bureau"), was notified by the Attorney General, as required by paragraph (2) of Section 202(n) of the Social Security Act (Appendix B, *infra*, p. 54), that appellee had been deported (R. 13, 48). The Bureau, in conformance with the mandatory provisions of paragraph (1) of said Section 202(n) (Appendix B, *infra*, pp. 53-54), suspended payment of appellee's old-age benefits, effective as of September 1956 (R. 12, 52).[2] Notice of the suspension was given to appellee's wife (R. 55).

On February 26, 1957, appellee appointed his wife and an attorney as his representatives in an effort to have his old-age benefit payments reinstated and paid to him in Sofia, Bulgaria (R. 53), and on the same day filed a request for a hearing with the Social Security Administration (R. 21). Pursuant to Section 205(b) of the Social Security Act (42 U.S.C., Supp. V, 405(b)), a hearing was held before a referee of the Office of Appeals Council in the Social Security Administration on December 30, 1957 (R. 22-36). On January 31, 1958, the referee sustained the Bureau's action suspending the payment of benefits (R. 12-14). On February 12, 1958, appellee requested a review of the referee's decision by the Appeals Council (R. 10) and on March 13, 1958, the Appeals Council informed appellee that his request was denied (R. 9).[3]

On May 5, 1958, appellee instituted this action in the

[2] The Bureau, by inadvertence, paid benefits to appellee for the month of September 1956 (R. 52).

[3] Under applicable regulations, 20 C.F.R. 422.6, the Council has discretionary power to grant or deny a request for a review of a decision rendered by one of its referees.

United States District Court for the District of Columbia (R. 1-2), seeking statutory review of the administrative decision pursuant to Section 205(g) of the Social Security Act (42 U.S.C. 405(g)). The complaint alleged that the action of the appellant in suspending the benefit payments to the appellee, "pursuant to the provisions of section 202(n) of the Social Security Act," was illegal and unconstitutional (R. 2).[4] On January 21, 1959, on motion by appellee and cross motion by appellant for summary judgment (R. 57, 58), appellee's motion was granted (Appendix A, *infra*, pp. 49-50; R. 78-79, 85-86).[5] The court held that Section 202(n), as here applied, is repugnant to the due process clause of the Fifth Amendment because it deprived appellee of a "property right" which had "fully accrued" to him (Appendix A, *infra*, p. 41). In summary, the court said (*ibid.*):

> This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits because of deportation.[6]

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[4] In his memorandum of points and authorities in support of his motion for summary judgment, appellee conceded that "[t]he sole issue in the case * * * is the constitutionality of section 202(n) of the Social Security Act."

[5] On February 20, 1959, the order of the District Court granting appellee's motion was, with the consent of counsel for appellee, amended in a respect not pertinent here (R. 87-88; Appendix A, *infra*, pp. 51-52).

[6] Neither party in the court below requested the convening of a three-judge court pursuant to 28 U.S.C. 2282 (forbidding the granting of injunctions restraining the enforcement, operation or execution of Acts of Congress for repugnance to the Constitution otherwise than by three-judge district courts). While we think the convocation of such a court was unnecessary for the reasons stated immediately below, the question is not, in our opinion,

THE QUESTION IS SUBSTANTIAL

The question of the validity of an Act of Congress making mandatory the suspension of a deported alien's social security benefits until such time as he may be lawfully readmitted to the United States for permanent residence is of plain importance. Appellee happens to be an alien whose deportation was based on past (post-entry) membership in the Communist Party (paragraph (6)(C)(i) of Section 241(a) of the Immigration and Nationality Act). But the provision of the Social Security Act which has been declared invalid by the judgment appealed from (Section 202(n); Appendix B, *infra*, pp. 53-54) applies, with a

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wholly free of doubt. Since the issue is jurisdictional (*Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977; *Stratton* v. *St. Louis Southwestern Railway*, 282 U.S. 10, 15-18), we mention it so that the Court, should it take a different view, may take appropriate action (see *Federal Housing Administration* v. *The Darlington, Inc.*, *supra*) without reaching the merits of this appeal. (Or the Court may wish to defer consideration of the jurisdictional issue until the hearing of the merits of the appeal, should it note probable jurisdiction.)

The argument that a single judge was without power to grant the relief prayed for in appellee's complaint and that a three-judge court was required to be convoked is based on the fact that (arguably at least) what the complaint sought, in substance if not in form, was injunctive relief—restraint of the enforcement of Section 202(n) of the Social Security Act for repugnance to the Constitution. As against that argument, it is to be noted that the complaint (R. 1-2), entitled "Complaint for Statutory Review" (R. 1), was brought under and invoked the jurisdiction of the court under Section 205(g), the statutory review provision of the Social Security Act (42 U.S.C. 405(g)). Section 205(g) provides in pertinent part that "Any individual, after any final decision of the Administrator made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action * * * brought in [an appropriate] district court * * *. * * * The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a

few exceptions (see *infra*, pp. 18-19), to all deported aliens.[7] The holding of the District Court involves an interpretation of the Fifth Amendment which is in conflict with prior judicial decisions, and rests, we believe, upon a misconception of the congressional policy un-

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rehearing. * * *." In short, this special statutory procedure is for a general "civil action" to "review" the administrative decision, in which the court is to affirm, modify, or reverse that decision. The gist of the proceeding is the "review" of the administrative determination. In decisions dealing with similar statutory review provisions, it has been held that the judicial review thus authorized extends to every legal question which the claimant is entitled to raise, including constitutional issues, and is not limited to questions of statutory construction, sufficiency of the evidence, and mere regularity of procedure. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 345-346; *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 135, 137-139; *Lee* v. *Roseberry*, 94 F. Supp. 324, 327 (E.D. Ky.). In view of this, it seems very likely that the special statutory review procedure provided for by Section 205(g) furnishes the exclusive remedy with respect to determinations under the Social Security Act, including challenges to the constitutionality of specific provisions of the Act, so that the three-judge provision of 28 U.S.C. 2282 (which would have applied in the absence of Section 205(g)) does not govern in this class of case. See *Lee* v. *Roseberry*, *supra*, 94 F. Supp. at 328.

Furthermore, we note that appellee's complaint for statutory review did not in terms request injunctive relief. And it is precisely the request for such relief, not merely that the validity of an Act of Congress is drawn in question, that makes appropriate and necessary the convocation of a three-judge court. *Garment Workers* v. *Donnelly Co.*, 304 U.S. 243, 250. Indeed, the administrative order suspending appellee's benefits had already been entered at the time of the filing of the complaint, and had in fact been outstanding for some eight months when the complaint was filed (*supra*, pp. 4-5). For this reason, the complaint cannot be considered a petition for injunctive relief in the usual sense of a suit to enjoin the taking of future action feared or threatened, although it can be said that there was implicit in the complaint a request to restrain the *continued* suspension of appellee's benefits.

[7] It applies to aliens deported under any one of all but four of the 18 paragraphs under Section 241(a) defining the categories of aliens whom the Attorney General is required to deport (Appendix B, *infra*, pp. 53, 54-63).

derlying the national social security program. In addition, the decision may affect adversely the administration of Section 202(t) of the Act (42 U.S.C., Supp. V, 402(t)), which, with certain qualifications, requires the suspension of benefits to any alien who voluntarily absents himself from the United States for longer than six months if he does not have forty quarters of coverage.[8] Finally, the decision, based as it is upon a "vested interest" concept of the nature of social security benefits, would seem to cast doubt, at least, upon the constitutionality of a number of other provisions of the Social Security Act, *e.g.*, the provision requiring that monthly benefits be reduced (or even totally eliminated) in the case of beneficiaries under the age of 72 who earn in excess of $1,200 per year (Section 203(b)(1) and (e)(2), 42 U.S.C., Supp. V, 403(b)(1) and (e)(2)).

1. As noted *supra*, p. 5, the District Court's decision is bottomed on the assumption that the Social Security Administration's award in March 1956 of monthly benefits to appellee in the amount of $55.60 per month, effective as of November 1955, vested in him an "accrued property right" (Appendix A, *infra*, p. 41), of which he was deprived without due process when those payments were suspended—pursuant to the express mandate of Congress, enacted prior to the time appellee commenced to receive or became eligible to receive any social security benefits—following his de-

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[8] This suspension does not apply, *inter alia*, to aliens of a foreign nation which permits citizens of the United States to draw benefits under its own welfare programs while living outside that foreign nation or to aliens with forty quarters of coverage or who had resided for ten years or longer in the United States.

portation in July 1956. This assumption is erroneous, and at war with the entire philosophy underlying the Social Security Act. As against the right of Congress, expressly reserved from the time of the original enactment of the Social Security Act (Section 1104, 49 Stat. 648, 42 U.S.C. 1304), "to alter, amend, or repeal any provision of this Act," there can be no "vested" or "property" right to old-age or survivors' benefits under Title II of the Social Security Act, and nobody can acquire any such right.

The right to benefits under the Social Security Act is a statutory, conditional right, which the possessor takes and holds subject to the conditions which Congress has attached. It is a "creative right," as has been said, whose nature and character "are dependent upon the statute creating it." *Ewing* v. *Risher*, 176 F. 2d 641, 644 (C.A. 10). "[A] person only has a right to Social Security payments to the extent that such right is supported by the provisions of the statute. Such a right is the creature of the Act and does not exist without it. Such right may come into being only upon strict adherence to the conditions set forth in the Social Security Laws." *Price* v. *Folsom*, 168 F. Supp. 392, 398 (D. N.J.).

The old-age monthly benefits program which Title II of the Social Security Act establishes is not in any true sense a federally-administered "insurance" program under which each worker pays "premiums" over the years and acquires at retirement age an indefeasible right to receive for life a fixed monthly benefit, or "annuity", irrespective of the amount of his current earnings or of other conditions. While the Act uses the term "insurance" (see, *e.g.*, §§ 201, 202, 42 U.S.C. 401,

402), the true nature of the program is to be determined from its actual incidents.

The "contribution" exacted under the social security plan from an employee in covered employment, in the form of payroll deductions made by the employer on behalf of the Government and paid into the general Treasury, is a true *tax*.[9] *Helvering* v. *Davis*, 301 U.S. 619, 635, 645-646. It is not comparable to a premium under a policy of insurance promising the payment of an annuity commencing at a designated age. The statutory authorization for the payroll deduction is codified in the Internal Revenue Code and reads: "In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages * * *." 26 U.S.C., Supp. V, 3101. The employer's contribution is an "excise tax" levied on his employees' payrolls. 26 U.S.C., Supp. V, 3111. These tax levies are "paid into the Treasury of the United States as internal-revenue collections." 26 U.S.C., Supp. V, 3501. The collections are not earmarked in any way. See *Helvering* v. *Davis*, *supra*, 301 U.S. at 635. The so-called "Trust Fund" established by Section 201 of the Social Security Act (42 U.S.C., Supp. V, 401), from which benefits are paid to eligible individuals, is maintained by standing annual appropriations made by Congress "out of any moneys in the Treasury not otherwise appropriated" (Section 201(a), 42 U.S.C., Supp. V, 401(a)). That the con-

[9] The "tax" provisions applicable to the social security system were originally contained in Title VIII of the Social Security Act (49 Stat. 636), entitled "Taxes With Respect to Employment." It provided, *inter alia*, for an "Income Tax on Employees" and an "Excise Tax on Employers" (49 Stat. 636, 637).

tributions are true "taxes" is firmly established. *Helvering* v. *Davis, supra; Cain* v. *United States*, 211 F.2d 375, 377 (C.A. 5), certiorari denied, 347 U.S. 1013; *Abney* v. *Campbell*, 206 F.2d 836, 841 (C.A.5), certiorari denied, 346 U.S. 924.

Payment of these taxes, moreover, is not the test in determining eligibility for benefits under Title II of the Social Security Act. The determining factor is past employment of such character as falls within the purview of the term "employment" under the Act. Section 210(a), 42 U.S.C. 410(a). The only necessary prerequisite for entitlement to benefits is a record in the Bureau of Old-Age and Survivors Insurance showing a minimum covered wage for a specified period of time. Section 214, 42 U.S.C. 414. See also *Analysis of the Social Security System*, Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83rd Cong., 1st Sess., pp. 962-963 (1953). Benefits are computed individually in each case on the basis of earnings in covered employment, rather than on the basis of the amount of taxes which an individual has paid while in such employment (*id.*, p. 948). A striking example of the lack of correlation between taxes paid and benefits received is the provision for the reduction (and possible total elimination) of monthly benefits in the case of beneficiaries under the age of 72 who earn in excess of $1,200 per year (Section 203(b)(1) and (e)(2), 42 U.S.C., Supp. V, 403(b)(1) and (e)(2)). Another example of such lack of correlation is the wage credit which was afforded to servicemen by the 1950 amendments to the Act (Act of August 28, 1950, c. 809, Title I, § 105, 64 Stat. 512, 42 U.S.C. 417). A third example lies in the fact that the benefits

payable in the early years of the social security program were far in excess of the benefits that would have been payable if the employee's own social security tax-levies, or "contributions", had been used to purchase an "annuity" under a private policy of insurance." *Analysis of the Social Security System*, Hearings, etc., *supra*, p. 943.

These facets of the social security program establish that the benefits payable thereunder are, in legal terms, of the nature of statutory pension benefits, or gratuities, rather than "vested" or "property" rights. Consistent with this view is the ruling of the Internal Revenue Service that monthly benefit payments are voluntary payments to the recipient by the Government—not in the nature of purchased annuities or additional wages—and hence within the scope of former Section 22(b)(3) of the Internal Revenue Code of 1939 (now 26 U.S.C., Supp. V, 102) exempting from taxation "the value of property acquired by gift * * *." I.T. 3447, Int. Rev. Cum. Bull., 1941-1, p. 191; *Analysis of the Social Security System*, Hearings, etc., *supra*, pp. 970-975.

Similarly, the Bureau of Employees' Compensation, Department of Labor, considers social security benefits to be in the nature of gratuities rather than "salary, pay, or remuneration" within the meaning of Section 7 of the Federal Employees' Compensation Act, 5 U.S.C. 757.[10] See *Analysis of the Social Security System*, Hearings, etc., *supra*, pp. 976-979. And see

[10]Section 7 prohibits the payment of any salary, pay or remuneration while the injured employee is in receipt of workmen's compensation under the Federal Employees' Compensation Act, and

Helvering v. *Davis*, *supra*, 301 U.S. 619, 640, where this Court noted that the "scheme of benefits" created by Title II of the Social Security Act is constitutional under the power of Congress to "spend money in aid of the 'general welfare' ".

This Court has also pointed out in *Lynch* v. *United States*, 292 U.S. 571, 576-577, the difference between insurance, which creates vested rights, and pensions and other gratuities, involving no contractual obligations. And it has held that an individual claimant acquires no "vested rights" in a gratuity-type benefit paid by the Federal Government to a veteran or to his dependent. "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government which Congress has the right to give, withhold, distribute, or recall, at its discretion." *United States* v. *Teller*, 107 U.S. 64, 68. And again: "Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right." *United States* v. *Cook*, 257 U.S. 523, 527. See also *Dodge* v. *Board of Education*, 302 U.S. 74, 79.[11]

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the question arose as to the nature of the benefit payments under the social security program, where such payments are based upon federal employment.

[11] Constitutional challenges of other provisions of the Social Security Act which reduced or withheld benefits from individuals who (unlike appellee) had fully qualified for and were awarded such benefits *prior* to the enactment of the provisions in question have been rejected. *Price* v. *Folsom*, 168 F. Supp. 392 (D. N.J.) (1954 amendment, reducing the monthly payments to a beneficiary on account of self-employment income, held not to have deprived him of any "vested right"); *Mulcahey* v. *Folsom*, 156 F. Supp. 34 (E.D. N.Y.) (1950 amendment, excluding claimants who were earn-

2. Since, for the reasons just summarized (*supra*, pp. 8-13), the recipient of social security benefits has no vested or "property" right to the continued receipt of such benefits, and since Congress has expressly reserved its "right to alter, amend, or repeal any provision of" the Social Security Act (Section 1104, 49 Stat. 648; *supra*, p. 9), we believe that the suspension of appellee's benefits would have been valid even if the provision of the Social Security Act pursuant to which this action was taken (Section 202(n)) had been enacted *after* appellee became eligible for and commenced to receive his monthly benefits. In fact, however, it was enacted *prior* to the time when

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ing in excess of a stated amount, held not to have deprived an adversely affected beneficiary of any "vested right").

Steinberg v. *United States*, 163 F. Supp. 590 (Ct. Cls.), on which the District Court placed considerable reliance in this case (see Appendix A, *infra*, pp. 34-39, 40-41), is distinguishable in several vital respects. First, *Steinberg* involved an annuity under the Civil Service Retirement Act and a retirement fund towards which the annuitant had contributed over the years through deductions from his salary. Such contributions are not and have never been considered taxes; the retirement benefits under the Civil Service Retirement Act are "part of the inducement for remaining in the Government service" (163 F. Supp. at 593 (concurring opinion)). The payroll deductions under the Social Security Act, on the other hand, are, as we have seen, true taxes, and lack many of the incidents of "contributions" towards a retirement fund, or "annuity." Second, Steinberg's annuity was suspended because he availed himself of a constitutional right (the privilege against self-incrimination). Appellee's benefits were suspended as a consequence of his deportation under a concededly valid statute following proceedings whose legality is not questioned. Third, Steinberg had become entitled to and had been receiving his annuity for several years prior to the enactment of the statute under which his annuity was suspended. On the other hand, Section 202(n) of the Social Security Act, the statutory authority for the suspension of appellee's benefits, was enacted and took effect (as we point out *infra*, pp. 14-16) prior to his becoming eligible to receive any such benefits.

appellee first became eligible to receive any such benefits.[12] Thus, at the time he first became eligible to receive and commenced to receive benefits, the statutory provision pursuant to which those benefits were later suspended was already on the books. This, in short, is not a case in which Congress enacted a law having the effect of terminating or suspending a person's social security benefits after he had become entitled to and begun to receive them, but one in which the statutory basis for the suspension was already present when the beneficiary first became eligible for benefits. He thus took his benefits subject to their later suspension pursuant to an already existing law.[13] For this reason, the considerations arguing against the notion of any one's having a "vested right" in the continued receipt of social security benefits which

[12] Section 202(n) was enacted and took effect September 1, 1954. Appellee first became eligible to receive social security benefits in November 1955 (*supra*, p. 3).

[13] The District Court said in its opinion that it did not believe that Congress may "completely deprive one of [social security] benefits after they have fully accrued" (Appendix A, *infra*, p. 41). This observation of the court may lead to an incorrect inference. As we have pointed out in the text, appellee's entitlement to benefits had *not* "accrued" as of the time of the enactment of Section 202(n); and it was under the terms of that provision that his benefits, which began later, were suspended. His deportation, it is true, took place after his entitlement to benefits accrued, and it was his deportation which occasioned the suspension of his benefits. But the statutory authority for the suspension substantially antedated his original qualifying for benefits.

Although the facts are not revealed in the record in the court below, the Department of Justice files indicate that the deportation proceedings against appellee commenced as early as October 1953, and the Board of Immigration Appeals dismissed his appeal from the order of deportation on November 9, 1954—more than a year prior to the time he first became eligible and applied for social security benefits (November 13 and December 2, 1955, respectively; see *supra*, p. 3). He was not actually deported until July 1956.

have once begun (*supra*, pp. 8-13) have especial force and application in this instance.

3. This case involves no question of an arbitrary cutting off by Congress of social security benefits to which a recipient would be otherwise entitled. Appellee is a deported alien. It was not unreasonable for Congress to amend the social security program so as to confine the benefits payable thereunder to citizens and alien residents of this country. The social security program was enacted to promote the "general welfare" (*Helvering* v. *Davis*, *supra*, 301 U.S. 619, 640) of the residents of *this* country. Since the Government's power to terminate its hospitality to aliens is well settled (*Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587, and cases cited), it would be anomalous to suggest that it lacks the power also to suspend or even terminate welfare benefits—incidents of its hospitality—upon the departure of an alien. While Congress has made appropriations for the economic assistance of foreign countries and their citizens and residents, it is free to keep these programs separate from the social security program, which is primarily designed for the welfare of residents of the United States.

If it be said that it is unfair to an alien deportee to cut off, upon his deportation, the social security benefits which he has begun to enjoy after "contributing" thereto over the years while working in this country, the answer is, as we have seen, that his "contributions" were in reality true taxes, and not premiums contributed towards the purchase of an insurance annuity. Since social security "contributions" are taxes, such an argument can carry no more weight than a conten-

tion that the act of deportation itself is unlawful because it deprives the alien of his right to the enjoyment of the public parks, highways, and community facilities which his income and property tax payments, made prior to deportation, helped to construct and maintain.

It is true that (in cases of those who do not have forty quarters of coverage) Congress has differentiated between deported aliens and aliens who voluntarily absent themselves from this country. In the case of the former, the suspension of benefits commences immediately upon their deportation (Section 202(n)(1)(A), 42 U.S.C., Supp. V, 402(n)(1)(A); Appendix B, *infra*, p. 53). In the case of the latter, suspension does not begin until after they have been outside the United States for six consecutive months (Section 202(t)(1), 42 U.S.C., Supp. V, 402(t)(1)).[14] But this distinction is not unreasonable. Congress may well have felt that the chance of a deported alien's early lawful return to this country (at which time his social security benefits would recommence; see fn. 14) was sufficiently slight to warrant the immediate suspension of his benefit payments following his deportation, but have felt, on the other hand, that the alien who voluntarily leaves the country might well be planning on an early return, so that it would not be feasible or just to suspend his

[14] As noted *supra*, p. 8, the provision for the suspension of benefits payable to aliens who voluntarily absent themselves from the United States is subject to certain qualifications. See, *e.g.*, fn. 8, *supra*, p. 8. Both in the case of deported aliens and aliens who absent themselves voluntarily, payments are not terminated completely, but *suspended*, pending their lawful return (if ever) to this country. See Section 202(n)(1)(A)(ii), 42 U.S.C., Supp. V, 402(n)(1)(A)(ii) (Appendix B, *infra*, p. 53, and Section 202(t)(1)(B), 42 U.S.C., Supp. V, 402(t)(1)(B).

payments during the period of his absence until he had remained abroad for six consecutive months.

It is also true that not all deported aliens are subject to the suspension-of-benefits provisions of Section 202(n). Of the eighteen grounds for deportation enumerated under Section 241(a) of the Immigration and Nationality Act (Appendix B, *infra*, pp. 54-63), fourteen are cited in Section 202(n). However, the District Court's judgment in no way turned on this distinction which Section 202(n) draws between different classes of deportees (see Appendix A, *infra*, pp. 39-40, 41). Moreover, the paragraphs of Section 241(a) of the Immigration and Nationality Act cited in Section 202(n) cover the vast majority of causes of deportation and of deportees; and there are reasonable grounds for the exceptions.[15] In any event, one who

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[15] The only paragraphs of Section 241(a) which are not subject to the suspension provisions of Section 202(n) are paragraphs (3), (8), (9), and (13) of Section 241(a). H. Rept. No. 1699, 83rd Cong., 2d sess., p. 77, characterizes the *included* deportation provisions as involving "deportation because of unlawful entry, conviction of a crime, or subversive activity." The four excluded provisions do not fall into that category, and may have been excluded because Congress thought they did not involve serious derelictions.

In addition, two of the excluded provisions (paragraphs (3) and (8)) deal with persons deported for becoming public charges within five years after entry. It may be that Congress felt (a) that it would be unfair to the other country to deport such destitute persons without letting them retain their modicum of social security benefits, or (b) that such destitute persons, after so few years in this country, would be unlikely to have social security payments coming to them. With respect to paragraph (9), providing for the deportation of persons admitted as nonimmigrants who fail to maintain that status properly, Congress may, here too, have thought it unlikely that such persons would be eligible for social security benefits. Paragraph (13) deals with aliens who, prior to or within five years after entry, aid other aliens to enter this country illegally.

comes within a class as to whom Congress clearly has power to terminate or suspend the payment of social security benefits cannot be heard to object that congressional action accomplishing that result is invalid because Congress failed to make the class of persons affected by such action as large as it might, had it chosen to do so. Cf. *German Alliance Insurance Co.* v. *Kansas*, 233 U.S. 389, 418: "[D]iscrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise." [16]

Here, again, because of the limitation of the scope of the paragraph to the first five years after entry, Congress may have felt that persons coming within this category would be unlikely to have social security payments coming to them, so that it would be improbable that there would be significant numbers of aliens in this class who would present any problem from the standpoint of the remittance of social security payments to foreign countries.

[16] See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584; *Atchison, Topeka and Santa Fe Railroad* v. *Matthews*, 174 U.S. 96, 106. And see *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 578 (C.A. 6), certiorari denied, 335 U.S. 908: "It is * * * well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not invalid if it bears a reasonable relation to the purposes of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification if it is not patently irrational and unjustifiable [citing cases]."

CONCLUSION

For the foregoing reasons, it is submitted that the question presented by this appeal is substantial and of public importance, and that probable jurisdiction should be noted.

Respectfully submitted,

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APRIL, 1959.

APPENDIX A

Filed January 14, 1959. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, PLAINTIFF

v.

MARION B. FOLSOM, SECRETARY OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

MEMORANDUM OPINION

FACTS

The plaintiff in this case immigrated to the United States in 1913 from Bulgaria. He was employed in the United States in employment covered by the Social Security Act from December of 1936 until January, 1955. In December of 1955, he filed an application for old age benefits, and he received an award of $55.60 per month effective as of November, 1955.

On July 7, 1956, the plaintiff was deported to Bulgaria pursuant to paragraph (1) of Section 241(a) of the Immigration and Nationality Act. On August 31, 1956, the Attorney General of the United States notified the Bureau of Old Age and Survivors Insurance of the the Department of Health, Education and Welfare of the fact that the plaintiff had been deported. The Bureau, pursuant to Section 202(n) of the Social Security Act (Title 42, U.S.C. Sec. 402(n))[1], suspended payment of plaintiff's old age insurance benefits from and after September, 1956. However, it was through

[1] See Appendix, *Note 1*.

inadvertence that the Bureau did pay benefits to the plaintiff for the month of September, 1956.

The plaintiff's wife, Barbara B. Nestor, was given notice of the suspension of payment of old age insurance benefits in November of 1956. In February of 1957, the plaintiff appointed his wife and Irwin Gostin, an attorney, to represent him in his attempts to have the benefit payments reinstated and paid to him in Sofia, Bulgaria.

On January 31, 1958, a decision of a referee of the Department of Health, Education and Welfare was rendered subsequent to a hearing which was held on December 30, 1957, said decision holding that the Bureau properly suspended the payment of benefits to the plaintiff in this case. Following this, on May 5, 1958, plaintiff filed a complaint in this Court for statutory review.

The case is now before this Court on cross-motions for summary judgment, oral argument having been afforded both parties on November 24, 1958.

CONTENTIONS OF PLAINTIFF

The sole issue in this case, according to the plaintiff, is the constitutionality of Section 202(n) of the Social Security Act. He contends that this section of the Act, as applied to him, is unconstitutional. In support of this conclusion, his argument sets forth the following contentions:

1. *Plaintiff is entitled as a matter of right to Social Security Benefits.*

The plaintiff argues that "throughout the history of the Social Security Act, old age insurance benefits have been referred to as a right of the recipient which he has earned and paid for." He also places reliance upon the 1949 Report of House Ways and Means Com-

mittee, President Eisenhower's message of January 14, 1954 (100 Cong. Rec., 83rd Cong., 2nd Session, p. 257), remarks of Senator Millikin (100 Cong. Rec. p. 14382) and also upon the remarks of Senator George (102 Cong. Rec., p. 15110), all of which, in effect, state that Social Security benefits are not charity or "a handout", but rather are paid to the recipient as an earned right and are related in part to the individual's earnings.

2. *Deprivation of Old Age Insurance Benefits is the imposition of a penalty.*

The plaintiff reasons that benefit payments are derived from contributions of covered workers, their employers and self-employed persons. The payments that he claims under the Act were, in fact, earned through his work and are assured as a matter of statutory right. However, Congress has adopted an amendment to the Social Security Act which may deprive a person of old age insurance benefits upon conviction of certain crimes and may actually constitute a part of the sentence imposed upon such person (Title 42 U.S.C., Sec. 402(u)).[2] Therefore, the plaintiff argues that the witholding of his benefits constitutes a penalty.

In reference to this amendment, the plaintiff's conclusion that such deprivation is a penalty is also based upon letters from the Secretary of Health, Education and Welfare to the Senate Finance Committee on March 28, 1956 (Hearings before the Committee on Finance of U.S. Senate, 84th Cong., 2nd Session (pp. 1318-1319))[3] and from the Director of the Bureau of the Budget to the Chairman of the Finance Committee (p. 1342).[4]

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[2] See Appendix, *Note 2*.
[3] See Appendix, *Note 3*.
[4] See Appendix, *Note 4*.

Plaintiff also contends that even if the benefits are a gratuity and not a right, he is still entitled to them and that a deprivation is an imposition of a penalty exercised in nonconformity to constitutional standards.

3. *Deprivation of Old Age Benefits in This Case Violated the Constitution*

The basis for denying to the plaintiff his old age benefits was his deportation which, in turn, was based upon his past membership in the Communist Party. He concedes that deportation based on this activity has withstood constitutional challenge but alleges that the deportation was carried out "solely on the basis that a deportation is not penal in character and is accordingly not subject to the provisions of the ex post facto and bill of attainder clauses of the Constitution, and for the same reason need not conform with the constitutional requirements governing the imposition of a penalty." Consequently, he alleges that the same statute and procedure cannot serve as the basis for the imposition of a penalty. He further alleges that Congress recognized this in 1956 when, by the amendment to the Social Security Act, the imposing of such a penalty (i.e., deprivation of old age insurance benefits) was provided for upon conviction of certain crimes upon the principle that the deprivation was part of the judicial process and was imposed only after a judicial trial.

Plaintiff contends that Sec. 202(n) of the Social Security Act is invalid as an ex post facto law and as a bill of attainder. He further contends that the statute is against the due process clause of the Fifth Amendment to the Constitution because deprivation of the benefits has no relation to the aims of the Social Security Act and that since the Act, itself, does not require moral character as a condition to eligibility,

there is no reason to discriminate against the group of which the plaintiff is a member.

Finally, the plaintiff states that the suspension of benefits was based upon his deportation and this, in turn, was based upon his participation in certain activities which he alleges were protected by the First Amendment. In other words, the real basis for his deportation and subsequent suspension of social security benefits was because of activities in which he could legally participate.

CONTENTIONS OF DEFENDANT

In his opposition to the plaintiff's motion for summary judgment and in support of his cross motion for summary judgment, the defendant alleges that the plaintiff did not have a vested right to receive social security benefits; that suspension of benefits under 202(n) of the Social Security Act is not the imposition of criminal punishment; that the aforesaid section of the Act is constitutional as applied to the plaintiff; and that the findings of fact by the Secretary are supported by substantial evidence and are conclusive.

PURPOSE OF THE ACT

Counsel for the defendant has emphasized the importance of considering the purpose of the Social Security Act. Although counsel for the plaintiff puts little, if any, emphasis on this, it would be well to briefly inquire into the purpose of this legislation.

The Social Security Act of 1935 "provided a system of old-age insurance for persons working in industry and commerce as a long-run safeguard against the occurrence of old-age dependency." (U.S. Code, Cong. Svc., Vol. 2, 81st Cong., 2nd Sess., 1950, p. 3289). Subsequent revisions and amendments through 1946

dealt generally with provisions for broader coverage, supplementary benefits for dependents of the primary beneficiary and determining contribution rates.

Congress, under authority granted to it by the Federal Constitution (Article 1, Sec. 8), saw fit to enact this legislation for the general welfare. Mr. Justice Cardozo, in the case of *Helvering* v. *Davis*, (57 S. Ct. 904; 109 A.L.R. 1319, 1324), wrote the following in discussing the Social Security Act:

> "But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poorhouse as well as from the haunting fear that such a lot awaits them when journey's end is near."

See also: *Ewing* v. *Black*, 172 F.2d 331, 335; *Ray* v. *Social Security Board*, 73 F. Supp. 58, 62.

Insofar as the purpose of the Act may be relevant, it arises in this manner, according to the Government:

> "A condition for the payment of benefits which takes into consideration whether or not the claimant is within or outside the United States is clearly reasonably related to the purpose of the program. The function which Title II of the Social Security Act was designed to serve was to minimize the great and rapidly growing cost of providing for needy aged persons in the United States * * * Certainly it would be pertinent to this purpose to consider, in establishing conditions prerequisite to eligibility for benefits, the physical presence or absence of a potential claimant within the United

States. A fortiori, it is pertinent and reasonable to condition the payment of benefits so as to exclude payment to an individual who has been deported therefrom." (Points and Authorities of defendant's motion p. 6).

With reference to this contention of the defendant, note must be taken of the following from Vol. 100, Cong. Rec., 83rd Cong., 2nd Session, Jan. 25, 1954, p. 736, wherein Congresswoman Mrs. St. George quotes from a letter received by her from the Secretary of Health, Education and Welfare: "As you know, neither United States Citizenship or residence in the United States are requirements for receipt of old-age survivors insurance benefits.

"In 1939, a provision which would have prevented the payment of benefits to otherwise eligible persons who live abroad was considered by the Congress but was not included in the law."

The foregoing statement was relative to a short remark of Mrs. St. George dealing with people who work in the United States and become eligible for old-age pensions and then return to their country of origin. She commented that in some countries it was possible for a foreign national residing in one of these countries to collect old-age pensions from the United States as well as from his own country. She deemed it necessary that legislation to prevent "a rather obvious abuse of the intention of the law should be considered." Congress, in 1956, added subsection (t) to Sec. 402, Title 42, entitled, "Suspension of benefits of aliens who are outside the United States."

The plaintiff, however, contends that the purpose of the Act is immaterial as applied to him. He says that the right of a worker to social security benefits is an earned right and a deprivation of the benefits is a

deprivation of property to which he is entitled, and to deprive him of such benefits is in the nature of an imposition of a penalty and as such must conform with constitutional requirements. In other words, when a person meets the requirements of the Act so as to be eligible for benefits, at that time he comes into possession of an accrued right, or a property right, and, as such, these benefits may then be taken away only in conformance with constitutional requirements.

NATURE OF THE BENEFITS AND POWER OF CONGRESS.

At this point it becomes necessary to determine as far as possible the nature of the benefits conferred under the Social Security Act. Briefly, the fund from which such payments are made was created pursuant to Title 42, U.S.C. 401.[5] The fund itself is made up of taxes which are paid by employees and employers; these taxes being compulsory for the most part. As a practical matter, the monies which supply this fund rarely come under the control of the person from whose wages they are deducted.

In order to be eligible for reception of these benefits, the Act sets forth three conditions precedent. (See Sec. 402(a))[6] Accordingly, once these conditions are fulfilled, the applicant then becomes entitled to benefits. The plaintiff in the present case fulfilled the statutory requirements in December of 1955 and he was awarded monthly benefits effective in November of 1955.

The defendant asserts that the right to benefits conferred pursuant to the statute is a creative right—that is, a statutory conditional right—which the Congress of the United States has the power to alter or terminate. In support of his position, the defendant cites

[5] See Appendix, *Note 5*.

[6] See Appendix, *Note 6*.

the case of *Ewing* v. *Bisher*, 176 F. 2d 641, 10th Cir. (1949) and *Norman* v. *B & O RR Co.*, 294 U.S. 240, 308. The *Ewing* case involved a situation whereby a widow's claim for a lump-sum payment of death benefits was denied on the ground that the claim was not filed within two years of the date of her husband's death, and her claim for widow's insurance benefits was allowed for a shorter time than she claimed because of her failure to file a timely application therefor. The Court at page 644, wrote:

> "* * * The rule is well settled that where a statute creates a right, such as the one in this case, unknown to the common law and limits the time within which the right must be asserted, the limitation defines and controls the right and the right ceases to exist if not asserted within the time fixed in the statute therefor."

Although the above-cited case lends support to the contention of the defendant as to the nature of the benefits conferred, it is readily distinguishable in certain aspects from the present case. The cited case dealt exclusively with the fulfillment of certain conditions precedent as prescribed by statute, whereas in the present case these conditions precedent were fulfilled, and it is the termination of benefits that is being contested.

In the case of *Ewing* v. *Gardner*, 185 F. 2d 781, the appellee, executor of the estate of the decedent brought an action for primary insurance benefits under the Social Security Act. The claim had been disallowed because the wage earner had failed to furnish the required proof of age at the time he filed his application for benefits. The Social Security Administration awarded the appellee a lump sum death payment but ruled that the appellee as executor was not entitled to receive primary insurance benefits under the Act. The

District Court held that the appellee was entitled to recover from the appellant the primary insurance benefits. An appeal followed, and at page 783, the Court stated:

> "* * * when the application was filed the three conditions or facts necessary under the statute to entitle the wage earner to receive the monthly primary insurance benefit actually existed. His right to the monthly primary insurance benefit accrued at that time. * * * In the absence of an express provision in the statute to the contrary, the furnishing of such proof is a condition precedent to payment, but not to liability."

And at page 784:

> "* * * The right of the wage earner to the primary benefit is not a gratuity, but is a property right which can be enforced by court action. Dismuke vs. U.S., 297 U.S. 167, 170; Lynch vs. U.S., 292 U.S. 571."

The holdings of the courts on this point have not, however, been uniform. For example, in the case of *Roston* v. *Folsom*, 158 Fed. Supp. 112, 120, the Court stated:

> "It is beyond reason to refer to Social Security benefits as property rights to which one might succeed."

In the same case, there is the following at page 121:

> "Social Security is in the nature of insurance. The terms 'insured', 'insurance', and 'beneficiary' are used throughout the act. The retirement benefits are similar to an annuity; the survivor benefits resemble insurance."

In the case of *Broderick* v. *Squire*, 163 F. 2d 980, the main question presented was whether an employer-employee relationship existed between the appellant and real estate brokers. The Court at page 981 said:

> "The Social Security Act, 42 USCA § 301, et seq. was enacted in 1935 to solve the problem of insecurity brought on by old age and unemployment. The method is to provide for payments in the nature of annuities to the elderly and compensation to the unemployed. U.S. vs. Silk, and Harrison vs. Greyvan Lines, 67 S.Ct. 1463, 91 L.Ed. ——. Revenue is obtained from the collection of employment taxes."

In connection with a review of the authorities relating to the nature of the benefits conferred by the Social Security Act, one must also consider the power of Congress to alter, repeal or amend the Act. The position of the defendant may be stated simply as this: Congress created this right to benefits—it was a right unknown to the common law, that is, it is a creative or statutory right, and as such Congress may make changes in the Social Security Act and in the rights thereunder from time to time as it sees fit.

In support of this position, the defendant relies upon the fact that Congress from the time of the enactment of the original Act expressly reserved to itself "the right to alter, amend or repeal any provision of this Act * * *." (Title 42, U.S.C., Sec. 1304). The defendant also cites the case of *Mullowney* v. *Folsom*, 156 Fed. Supp. 34. In that case, the claimant became entitled to benefits as of April, 1950. At this time, and up until January 1, 1951, "earnings from self-employment did not affect either benefits payable under the Act or deductions therefrom." (p. 35). Then, on January 1, 1951, an amendment to the Act became

effective which amendment "deprived him of Social Security payments by reason of his earnings as a self-employed real estate broker in excess first of $50 a month, and later $75 a month." (p. 35).

The question then presented was whether the plaintiff had a vested right to receive Social Security benefits as of April, 1950 which could not be adversely affected by legislation passed subsequent to that date.

The Court, in granting the motion of the defendant for summary judgment, wrote the following:

> "Social Security payments are made out of the general treasury and are financed by collections made from both employers and employees * * *
> "Payments made as a result of Congressional appropriation have not been thus far construed as contractual in their nature * * *
> "* * * The statute provides (Title 42, U.S.C., § 1304) as follows:
> 'The right to alter, amend, or repeal any provision of this chapter is reserved to the Congress,'
> "* * * It results from all the foregoing considerations that in the opinion of this Court, Edward Mullowney did not acquire a vested right in the Social Security payments allotted to him according to the terms of the Certificate to which reference has been made (and as they might be increased), which rendered them immune from the further exercise of Congressional control, pursuant to the terms of the Statute above quoted."

It appears well at this point to consider the question, namely: To what extent are the rights of public employees who are within the coverage of a statutory pension system vested, so as to render invalid, legislation repealing or modifying the provisions of the pension statute. Although Social Security benefits do not

equate, per se, to pension plan payments, in determining the nature of Social Security benefits it has been shown that they are similar to annuities. Annuities, pensions and Social Security benefits are similar in certain characteristics. The recipient under each plan receives payment of benefits usually at the time of his retirement. Also, the sources from which payments are made are composed essentially in the same manner —that is, by contributions, be they voluntary or involuntary. Thus, in determining to what extent the rights of beneficiaries under any system are vested, a study of these rights under a statutory system (pensions) now seems appropriate. The question is discussed at great length in 52 A.L.R. 2d 440, with a state by state analysis. The following appears at page 443:

> "§. 3. Federal Decisions (in cases involving federal state and territorial pension statutes)
> "The decisions of the federal courts, both in cases involving state statutes providing for pensions for public employees, and in cases involving similar federal and territorial enactments, support the general rule that a pension granted by a public authority is not a contractual obligation, but is a gratuitous allowance, in the continuance of which the pensioner has no vested right; accordingly, the pension is terminable or alterable at the will of the grantor.
> "* * * The federal courts have held that the rule that a pensioner has no vested right in the pension is applicable to pension systems under which participating employees are required to contribute, on either a voluntary or compulsory basis." (Citing cases in footnotes 4 and 5).
> "But an exception to the rule that a pensioner has no vested right in a pension has been drawn in the

> case of particular pension payments which have become due; the federal courts hold that the pensioner has a vested right in such payments." (Citing cases in footnote 6)

Thus far, it is seen that previous decisions of courts have approved the power of legislatures to revise upward or downward payments under pension plans, retirement acts, etc. The most important feature behind this fact is that these revisions were held to be lawful and thus not inconsistent with any provision of the Constitution. Or, as stated in *Constitution of the United States of America* by Corwin (p. 857):

> "Rights created by statutes are subject to qualification by Congress; benefits conferred gratuitously may be redistributed or withdrawn at any time (U.S. ex rel Burnett v. Teller, 107 U.S. 64, 68 (1883)."

However, the plaintiff contends that even if the benefits conferred under the statute are deemed to be a gratuity and not an earned right, the deprivation of them still must conform to constitutional requirements. In support of this contention, he relies upon the case of *Steinberg* v. *U.S.*, 163 F.Supp. 590. In that case, the plaintiff retired on February, 1951 and began to receive an annuity under the Civil Service Retirement Act (5 U.S.C., § 691). Subsequently, in September of 1954, he was subpoenaed before a Federal Grand Jury in New York, at which time he invoked the protection of the Fifth Amendment of the Constitution of the United States. The plaintiff was later advised by the defendant that his annuity was temporarily suspended and later this became permanent, such action being pursuant to Title 5, U.S.C. § 704(d).[7] The plaintiff then filed

[7] See Appendix, *Note 7*.

an action claiming that § 740(d) did violence to his rights as a citizen of the United States under the Constitution. The Court by a decision of three to one granted the motion of the plaintiff for summary judgment.

Judge Laramore held that the:

> "* * * right of a federal employee to an annuity is not born of a contractual relationship * * * but is more in the nature of a gratuity granted in appreciation for long and faithful service. Congress may in its wisdom modify the payments upward or downward without impairing the obligation of a contract. * * * Although an annuity is paid for past as distinguished from present services, the legal relationship between the parties is in all material respect parallel since a current Federal employee neither has a vested or contractual right to continued employment. Even so, the Supreme Court has said 'that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory' *Wieman* v. *Updegraff*, 344 US 183. Thus we are squarely met with the question as to whether or not it is arbitrary and discriminatory for the Federal government to exclude persons from its annuity rolls who have availed themselves of the protection provided for in the Fifth Amendment."

He held that upon the basis of Supreme Court decisions "such a law is an indiscriminate classification of the innocent with the guilty and must fall as an assertion of arbitrary power." (page 592).

Continuing, Judge Laramore wrote:

> "Furthermore, an act of Congress applying to persons such as plaintiff which inflicts punishment

without a judicial trial is a bill of attainder prohibited by the Constitution. U.S. vs. Lovett, 328 US 303; Cummings vs. State of Missouri, 4 Wall. 277; Ex Parte Garland, 4 Wall. 333. In this case the punishment inflicted by the Act was the denial of his annuity without due process. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties which within the meaning of the Constitution is a bill of attainder. Cummings vs. State of Missouri, supra. Notwithstanding that plaintiff had no vested or contractual right to his annuity, we believe that Congress in prescribing a punishment for persons who exercise a constitutional right has acted beyond the scope of the Constitution."

Judge Whitaker concurred in the result reached by the majority but viewed the case in a somewhat different light. He held, notwithstanding the case of *Dodge* vs. *Board of Education,* 302 U.S. 74 and cases subsequent to that case, that, "A federal employee who has retired from the service has a vested right in the retired pay to which he was entitled at the time of his retirement."

Also,

"When an employee enters the government service he does so relying upon the statute or regulations fixing the current compensation of the office and the amount to which he will be entitled upon retirement. So long as he remains in the government service, Congress of course has the right to change the compensation to be paid to the holder of the office, as well as the retired pay to which he will be entitled upon retirement. The employee takes

the office with knowledge, actual or constructive, of the power of Congress to do this. But after the employee has rendered the services required of him by the Government and severs his connection with the Government, he then becomes entitled to the retired pay in effect at the time of his retirement.

"This, I think, is a vested right, because it is compensation for services already rendered. Retired pay is * * * a part of the emoluments of the office."

Judge Whitaker then proceeded to strengthen his view first by an interpretation of Title 4, U.S.C. 401, carried in Title 5, U.S.C. 2254(b),[8] and second, by reference to a number of cases which hold that a person has such a vested right to retirement benefits. (52 A.L.R. 2d 437). He admits that "the decisions of the Federal courts are in the other direction." (p. 595). In his comment on the case of *Dodge* v. *Board of Education, supra,* he writes:

"I concede full power in the legislature to reduce retired benefits to people on the payroll when the Act was passed, but I deny the power of the legislature to reduce retirement benefits to people who have severed their connection with the Government; in other words to people who have already earned the retired pay in effect at the time of their retirement." (p. 595).

In another case with which he deals in his opinion, *MacLeod* v. *Fernandez,* 101 F. 2d. 20, cert. den. 308 U.S. 561, which "expressly held that the retired pay of a retired employee could be reduced by a law passed

[8] See Appendix, *Note 8.*

after the date of his retirement," (p. 596), Judge Whitaker states:

> "I do not agree with the decision in that case. If I am correct in saying that the retired pay is not a pension or a gratuity, but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
> "If this view is correct, Congress has taken this vested right without due process of law. I do not think this can be gainsaid and, hence, I do not enlarge upon it." (p. 596).

Chief Judge Jones, while concurring, touches upon an aspect of the case which the other judges did not treat. He states that the United States Government has many obligations calling for the payment of money; the courts determine what obligations exist and their extent thereof, but the power to pay or authorize their payment rests solely in Congress. He writes:

> "If Congress, therefore, chooses to withhold appropriations to pay the government's obligations, or any of them, it is not within the province of the courts to pass upon the wisdom of that decision, nor is it within their power to compel Congress to do otherwise." (Page 593).

He held in regard to retirement benefits that there is a definite contractual relationship which certainly becomes effective upon retirement but that with regard to pensions or gratuities, there is neither a contractual relationship nor a vested right and that Congress may reduce the amount from time to time.

In discussing the Act of Congress in the above-cited case, Chief Judge Jones wrote:

> " * * * But if by the act in the present case, Congress has merely withheld payment by restriction on appropriation or by a refusal to appropriate, the obligation of the United States to the plaintiff stands unimpaired, though unpaid. If this is all the act accomplishes there is nothing to prevent the present or a future Congress from recognizing the obligation to plaintiff by appropriation and payment and neither is there anything to prevent this court from entering judgment in favor of the plaintiff for the amount of the obligation without determining constitutional questions." (Page 593).

In conclusion, he wrote:

> " * * * If the act be construed as an intention on the part of Congress to destroy a right which became vested at the time of retirement, it would be invalid. But on the other hand if, as seems likely, the intention of the Congress was merely to decline to make an appropriation so long as the condition existed, such action was clearly within the scope of its authority."

As seen in the *Steinberg* case, *supra*, different approaches were taken by the different judges in forming a basis for their decisions. However, there was near unanimity on one point, that being that the statute was an arbitrary and unreasonable discrimination between employees who have availed themselves of a constitutional guarantee and those who have not used this guaranteed protection. Judge Madden in his dissent did not agree with this conclusion however.

Is the statute (Title 42 U.S.C. 402(n)) in the present case arbitrarily and unreasonably discriminating. The

basis for discrimination is that any one who has been deported under certain paragraphs of Sec. 1251 (a) of Title 8, U.S.C. is deprived of his benefits as opposed to those who have not been deported and thus not deprived of their benefits.

From the foregoing, it would be only reasonable to accept the fact that Congress has the right or power to make such amendments and repeals as are necessary from time to time. This is especially true when one realizes that the Act itself deals with what had been, and may even still be, the economic needs of a continually increasing portion of the population. Since the Act deals to a substantial extent with the economy of our nation, a casual glance at the economic history of the country reveals that many fluctuations, some minor, some extreme, have occurred, and it is only reasonable to assume that they will occur in the future.

However, to say that Congress has the right through its legislative enactments to cope with certain problems that may continually arise and that are relative to the purpose for which the Act was passed is one thing but it is an entirely different thing to say that Congress while legislating and purportedly in accordance with the basic designs and purposes for which the Act was originally passed, can or may deprive a person of a property right is quite another matter. For, as Judge Whitaker points out in the case of *Steinberg* v. *U.S.*, *supra*, at page 595:

> "* * * If I am correct in saying that the retired pay is not a pension or a gratuity but is compensation for services already rendered, then I think an employee's right to this retired pay does become vested at the time of his retirement.
>
> "If this view is correct, Congress has taken this vested right without due process of law. I do not

think this can be gainsaid and, hence, I do not enlarge upon it."

It has been seen from the foregoing authorities that Congress may validly revise or alter payments to beneficiaries of pension systems. Their power to reduce payments or to impose conditions to their payment has also been upheld. However, must it logically follow that because Congress has the power to exercise such revision or alteration that it may also completely deprive one of such benefits after they have fully accrued? This Court does not believe so.

As seen previously, the basic conflict is between the power of Congress to legislate in this field and the right of a person to an accrued property right. Prior decisions reveal, although not unanimously, that the nature of such benefits make them property rights, but property cannot be taken from a person without due process of law, that is, 'law of the land.'

This Court concludes that the plaintiff was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits because of deportation. The Court grants the plaintiff's motion for summary judgment.

Counsel will submit a proper order.

EDWARD A. TAMM

Dated: 1/13/59.

Filed January 14, 1959. Harry M. Hull, Clerk.

APPENDIX [to the District Court's opinion, *supra*]

Note 1. Title 42 U.S.C., Sec. 402.—*Termination of benefits upon deportation of primary beneficiary.*

(n)(1) If any individual is (after the date of enactment of this subsection) deported under paragraphs (1) (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18), of section 1251(a) of Title 8 then, notwithstanding any other provisions of this subchapter—

(A) no monthly benefit under this section or section 423 of this title shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary is notified by the Attorney General that such individual has been so deported and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence.

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii)

before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

Section 403(b) and (c) of this title shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 1251(a) of Title 8 enumerated in paragraph (1) of this subsection, the Attorney General shall notify the Secretary of such deportation.

Note 2. Title 42 U.S.C., Sec. 402—*Conviction of subversive activities, etc.*

(u) (1) If any individual is convicted of any offense (committed after August 1, 1956) under

(A) chapter 37 (relating to espionage and censorship), chapter 105 (relating to sabotage), or chapter 115 (relating to treason, sedition, and subversive activities) of Title 18, or

(B) section 783, 822 or 823 of Title 50,

Then the court may, in addition to all other penalties provided by law impose a penalty that in determining whether any monthly insurance benefit under this section or section 423 of this title is payable to such individual for the month in which he is convicted or for any month thereafter, and in determining the amount of any such benefit payable to such individual for any such month, there shall not be taken into account

(C) any wages paid to such individual or to any other individual in the calendar quarter in which

such conviction occurs or in any prior calendar quarter, and

(D) any net earnings from self-employment derived by such individual or by any other individual during a taxable year in which such conviction occurs or during any prior taxable year.

(2) As soon as practicable after an additional penalty has, pursuant to paragraph (1) of this subsection, been imposed with respect to any individual, the Attorney General shall notify the Secretary of such imposition.

(3) If any individual with respect to whom an additional penalty has been imposed pursuant to paragraph (1) of this subsection is granted a pardon of the offense by the President of the United States, such additional penalty shall not apply for any month beginning after the date on which such pardon is granted.

Note 3. Excerpts of letter from Secretary of Health, Education and Welfare to the Senate Finance Committee of March 28, 1956. (Hearings before the Committee on Finance of the U.S. Senate, 84th Congress, Second Session, on Social Security Amendments for 1955; p. 1318-1319)

"An individual establishes rights to benefits under the old-age and survivors insurance program by working in employment or self-employment covered by the law and paying social security contributions on his earnings. The costs of benefits and administration are met in their entirety from the contributions of covered workers, their employers

and self-employed persons. There is no contribution from general tax revenues.

* * *

" * * * if benefit rights of persons convicted of these crimes were terminated, a worker insured under old-age and survivors insurance would suffer a greater punishment than an individual whose work was in noncovered employment or who was not dependent on earnings from employment for his support. The punishment would be one that would last for the rest of the individual's life * * *

"As in the case of private pension and group insurance payments and as in the case of wages and salaries, benefits under old-age and survivors insurance are work-connected payments. It is this work connection—the fact that they are earned through work—that establishes the basic character of the benefits. Hence, under present law benefits are paid to an insured worker and his eligible dependents or survivors without taking into account his attitudes, opinions, behavior, or personal characteristics. The right to benefits having been earned, the individual's actions do not modify or restrict that right.

"Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs, and to other crimes which, while perhaps different in degree, are difficult to distiguish in principle."

Note 4. Excerpts of letters from the Director of the Bureau of the Budget to the Chairman of the Finance Committee. (Hearings before the Committee on Finance of the U.S. Senate, 84th Congress, 2nd Sess., on Social Security Amendments for 1955, p. 1342).

"It has always been stressed by the Congress that old-age and survivors insurance is not a Federal bounty, but rather a separate self-financed system of insurance, the costs of which are shared equally by employer and employee; that benefits are assured as a matter of statutory right; that the Federal Government is merely a trustee of the system and not a contributor; and that certain benefits are available to surviving dependents of an insured individual without any rights of election or other voluntary action on the part of the insured wage earner. The proposed amendment does not seem consistent with these principles * * *

"A further question involves the retroactive character of the amendment, since it would deny benefits based on contributions predating its enactment. This raises a legal and policy question as to the propriety of such retrospective action which should be resolved only after careful analysis extending to the whole range of civil disabilities and penalties which may be imposed on individuals convicted of the particular crime."

Note 5. Title 42 U.S.C. Sec 401—*Federal old-age and survivors insurance trust fund and Federal disability insurance trust fund.*

(a) There is created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors Insurance Trust

Fund." The Federal Old-Age and Survivors Insurance Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, which securities and amount the Secretary of the Treasury is authorized and directed to transfer to the Federal Old-Age and Survivors Insurance Trust Fund, and, in addition, such amounts as may be appropriated to, or deposited in, the Federal Old-Age and Survivors Insurance Trust Fund as hereinafter provided * * * "

Note 6. Title U.S.C. Sec. 402. *Old-Age and survivors insurance benefit payments—*

Old-Age insurance benefits.

(a) Every individual who

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65,

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) of this section, such individual's old-age insurance benefit for any month shall be equal to his

primary insurance amount (as defined in section 415(a) of this title) for such month.

Note 7. Title 5 U.S.C. Sec. 740(d)

There shall not be paid to any person who has failed or refused, or fails or refuses, prior to, on, or after the date of enactment of this Act, upon the ground of self-incrimination to appear, testify, or produce any book, paper, record, or other document, with respect to his service as an officer or employee of the Government or with respect to any relationship which he has had or has with a foreign government, in any proceeding before a Federal grand jury, court of the United States, or congressional committee, or to the survivor or beneficiary of such person, for any period subsequent to the date of such failure or refusal of such person or the date of enactment of this Act, whichever is later, any annuity or retired pay on the basis of the service of such person as an officer or employee of the Government.

Note 8. Title 5 U.S.C. 2254(b). *Consent to deductions.*

Each employee or Member shall be deemed to consent and agree to such deductions from basic salary, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services during the period covered by such payment, except the right to the benefits to which he shall be entitled under this chapter, notwithstanding any law, rule or regulation affecting the individual's salary.

Filed January 21, 1959. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1154-58

EPHRAM NESTOR, PLAINTIFF

v.

ARTHUR S. FLEMMING, DEFENDANT

ORDER

The above action came on before the Court on cross-motions for summary judgment. The Court having considered the pleadings in the case, the entire record including the record of the administrative proceedings before the Social Security Administration, and the briefs filed by the parties, and having heard argument in open court, and having filed an opinion on January 14, 1959, which opinion constitutes this Court's findings of fact and conclusions of law, it is by the Court this 21st day of January, 1959,

ORDERED, ADJUDGED and DECREED:

1. That defendant's motion for summary judgment be, and it is hereby, denied.

2. That plaintiff's motion for summary judgment be, and it is hereby, granted.

3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

4. That the defendant, Arthur S. Flemming, Secre-

tary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

5. That the clerk of the Court be, and he is hereby authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C.

/s/ EDWARD A. TAMM,
Judge.

Filed February 20, 1959. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 1154-58

EFHRAM NESTOR, Bul. Rusky No. 5, Sofia, Bulgaria, PLAINTIFF

v.

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare, Washington, D. C., DEFENDANT

AMENDED ORDER

Upon consideration of defendant's Motion to alter and amend the final order of this Court, dated January 21, 1959, which decreed

"1. That defendant's motion for summary judgment be, and it is hereby, denied.

"2. That plaintiff's motion for summary judgment be, and it is hereby granted.

"3. That the Determination of October 25, 1956 terminating the payment of social security benefits to the plaintiff is illegal, and it hereby is set aside, and the Determination of Award of Benefits to the plaintiff made on March 7, 1956, be, and it hereby is, reinstated.

"4. That the defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, pay or cause to be paid to the plaintiff or to his duly authorized agent all benefits that may

have accrued to the plaintiff under the Determination of Award of Benefits made on March 7, 1956, and all benefits that may accrue to him in the future pursuant to said Determination.

"5. That the clerk of the Court be, and he is hereby authorized and directed to return the cash security for costs of $50.00 deposited by the plaintiff by drawing and delivering a check for the same to plaintiff's attorney, David Rein, 711 Fourteenth Street, N. W., Washington, D. C."

it is this 20th day of February, 1959,

ORDERED, that the foregoing Order of January 21, 1959, be and the same hereby is amended by striking therefrom paragraph numbered 4 thereof.

/s/ F. DICKINSON LETTS,
United States District Judge.

Consented to this 4th of day of February, 1959:

/s/ DAVID REIN,
Counsel for Plaintiff.
/s/ JAMES C. HISE,
Counsel for Defendant.

APPENDIX B

1. Section 202 (n) of Title II of the Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 622), as amended by the Act of September 1, 1954, c. 1206, § 107, 68 Stat. 1083 (42 U.S.C., Supp. V, 402 (n)), provides in pertinent part:

> Sec. 202 [42 U.S.C., Supp. V, 402]. *Old-age and survivors insurance benefit payments.*
>
> * * * * *
>
> (n) *Termination of benefits upon deportation of primary beneficiary.*
>
> (1) If any individual is (after the date of enactment of this subsection) deported under paragraphs (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—
>
> (A) no monthly benefit under this section[1] * * * shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which the Secretary [of Health, Education and Welfare] is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence,

[1] I.e., the monthly "old-age insurance benefit" payable to each "fully insured individual" who "has attained retirement age" and has applied therefor pursuant to Section 202 (a) (42 U.S.C., Supp. V, 402 (a)).

(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

* * * * *

(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241 (a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation.

2. Section 241 (a) of the Immigration and Nationality Act (Act of June 27, 1952, c. 477, 66 Stat. 163, 204) (8 U.S.C. 1251 (a)) provides in pertinent part:

Sec. 241 [8 U.S.C. 1251]. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

(3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 [2] unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (*c*) of this title,[3] or under section 36 (*c*) of the Alien

[2] Section 265 (8 U.S.C. 1305) requires each alien in this country to notify the Attorney General in writing, within 30 days of the first day of January of each year, of his current address and further to notify that official within ten days of each change of address.

[3] Section 266 (*c*) (8 U.S.C. 1306 (*c*)) provides penalties for the willful making by an alien of a false statement in a registration application filed under section 262 (8 U.S.C. 1302), or for the fraudulent procurement of or attempt to procure his own or another's registration.

Registration Act, 1940[4] or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended,[5] or has been convicted under section 1546 of title 18 of the United States Code;[6]

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; (ii) any other totalitarian party of the United States; (iii) the Communist Political Association; (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct pred-

[4] Section 36 (c) of the Alien Registration Act, 1940, 54 Stat. 675, was substantially identical with, and has been superseded by, Section 266 (c) of the Immigration and Nationality Act, whose provisions are described in the preceding footnote.

[5] I.e., the so-called "Foreign Agents Registration Act" (22 U.S.C. 611-621).

[6] Section 1546 of Title 18 punishes the forgery or counterfeiting of visas and other entry documents, and related offenses.

essors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: *Provided*, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950,[1] unless such

[1] This section (50 U.S.C. 786) requires "Communist-action" and "Communist-front" organizations (as defined in 50 U.S.C. 782) to register with the Attorney General.

aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized Government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government of the

United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a),* unless the Attorney General is satisfied,

*Section 212 (a) (27) and (29) (8 U.S.C. 1182 (a) (27) and (29)) provide for the exclusion from the United States of aliens who the Attorney General knows or has reason to believe seek to enter the United States to engage in activities prejudicial to the public interest or harmful to the welfare, safety, or security of the United States, or to engage in espionage or sabotage, or to join or affiliate with any organization registered or required to be registered under Section 7 of the Subversive Activities Control Act, of

in the case of any alien within category (C) of paragraph (29) of such section, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248,[9] or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 238 (a)[10] and was without the required period of stay in such foreign contiguous

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[9] Section 248 (8 U.S.C. 1258) authorizes the Attorney General, with certain exceptions, to change the status of an alien lawfully admitted to the United States as a nonimmigrant from one nonimmigrant classification to any other nonimmigrant classification.

[10] Section 238 (a) (8 U.S.C. 1228 (a)) gives the Attorney General power to enter into contracts with transportation lines for the entry and inspection of aliens coming to the United States through foreign contiguous territory or adjacent islands.

territory or adjacent islands following such arrival * * *;

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs * * *;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a) [11]; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

[11] Section 212 (a) (12) (8 U.S.C. 1182 (a) (12)) provides for the exclusion from the United States of aliens who are prostitutes or who have been supported in whole or in part by the proceeds of prostitution.

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940 [12];

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: * * *; [13] or

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[12] Title I of the Alien Registration Act, 1940, 54 Stat. 670-671 (popularly known as the "Smith Act"), provided for the punishment of counseling insubordination or refusal of duty on the part of members of the armed forces (§§ 1, 5; now contained in 18 U.S.C 2387) and teaching or advocating or conspiring to teach or advocate the violent overthrow of the Government of the United States (§§ 2, 3, 5; now contained in 18 U.S.C. 2385).

[13] There follow at this point in the text of paragraph 17 a large number of Acts and Criminal Code sections. These include: 18 U.S.C. 793 and 794 (espionage); 18 U.S.C. 2388 (making false reports in time of war to hinder military operations, etc.); Act of October 6, 1917, 40 Stat. 385 (unauthorized manufacture, use, or possession of explosives in time of war); Act of May 22, 1918, 40 Stat. 559 (unauthorized entry into or departure from the United States in time of war); 18 U.S.C. 2151, 2153-2156 (sabotage); Selective Service Acts of 1940 and 1948; Universal Military Training and Service Act; 18 U.S.C. 871 (threats against the President); Trading With the Enemy Act; 18 U.S.C. 2384 (seditious conspiracy); and 18 U.S.C. 960 (setting on foot within the United States or taking part in a military expedition against a friendly foreign power).

(18) has been convicted under section 278 of of this Act [14] or under section 4 of the Immigration Act of February 5, 1917.[15]

[14] Section 278 (8 U.S.C. 1328) punishes the importation of aliens for purposes of prostitution.

[15] Section 4 of the Immigration Act of February 5, 1917, 39 Stat. 878, covered the same subject matter as is now dealt with in Section 278 of the Immigration and Nationality Act (see preceding footnote), and has been superseded by the latter.

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